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Supreme Court of the United States

JACK RUBIN, ALEX MOSKOVIC, DAVID MERMELSTEIN, IRENE MERMELSTEIN, FRED TAUCHER, HANS LINDENBAUM, HANNA HARELI, and DAVID GRINSTEIN,

Petitioners,

v.

ASSICURAZIONI GENERALI S.p.A, SAMUEL HERSLY, AGNES HEYMAN, PAOLA OREFFICE KULP, and EUGENIA SCHENCKER,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENT ASSICURAZIONI GENERALI S.p.A

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PARTIES TO THE PROCEEDINGS AND RULE 29.6 STATEMENT

There are no parties to the proceedings other than those listed in the caption.[1]

Respondent Assicurazioni Generali S.p.A. ("Generali") is an Italian corporation. It has no parent corporation and the only publicly held corporation that owns 10% or more of its stock is Mediobanca, S.p.A., another Italian corporation.

[1] Petitioners Hanna Hareli and David Grinstein were not original parties to the appeal before the Second Circuit. *See* Petition for Certiorari, Appendix A (caption).

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INTRODUCTION

Petitioners are objectors intent on scuttling a class action settlement of claims brought by Holocaust victims and their heirs concerning insurance policies issued by Generali and certain of its affiliates or subsidiaries in Europe before World War II. That settlement was carefully and repeatedly scrutinized by the courts below, and found to be fair, adequate, and reasonable, and in the best interests of the class. The petition for a writ of certiorari (the "Petition") raises no split between Circuit Courts, no conflict with any decision of this Court, and no important federal question; and no departure from the accepted and usual course of judicial proceedings has occurred. *See* Sup. Ct. R. 10. Rather, this case is a routine application of Rule 23 of the Federal Rules of Civil Procedure ("Rule 23") that was fully and fairly addressed by the courts below. The Petition should be denied.[2]

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[2] Petitioners' citation conventions are adopted herein. Therefore, the opinions below are cited to by referring to the Appendix to Petitioners' petition for certiorari ("Petition, Appendix __"). In addition, references to the circuit court record are based on the appendices filed in the Second Circuit, Appeal No. 07-1380-cv (the "Second Circuit Action"), as follows: A-# refers to the Joint Appendix, SUP-# refers to the Supplemental Appendix of Plaintiffs-Appellants, SPA-# refers to the Special Appendix, SJA-# refers to the Supplemental Joint Appendix, ASA-# refers to Appellees' Supplemental Index, and ASSA-# refers to Appellee's Second Supplemental Index.

COUNTERSTATEMENT OF CASE

Petitioners challenge a settlement that comes after a decade of litigation over policies sold by Generali before World War II in Europe to persons who later became victims of the Holocaust.[3] It was negotiated on behalf of the settlement class by experienced and reputable Class Counsel *after* the District Court (Mukasey, J.) dismissed the litigation as preempted on the same grounds that led this Court, in *American Insurance Ass'n v. Garamendi*, 539 U.S. 396 (2003), to strike state legislation specifically designed to promote such litigation. *See In re Assicurazioni Generali S.p.A. Holocaust Ins. Litig.*, 340 F. Supp. 2d 494, 497-508 (S.D.N.Y. 2004).[4]

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[3] The settlement comes also after the close of the monumental effort, lasting the better part of a decade, by the International Commission on Holocaust Era Insurance Claims ("ICHEIC"), presided by former Secretary of State Lawrence Eagleburger, to identify and pay pre-war policies issued to Holocaust victims. Generali and other major European insurers voluntarily participated in ICHEIC, and thousands of Generali policies were paid in that process under generous valuation, eligibility, and evidentiary standards. The enormous scope of the task, its technical complexity, and the vast archival, economic, and historical research involved, is summarized and available on ICHEIC's website, http://www.icheic.org/pdf/ICHEIC%20Legacy%20Document.pdf (last visited January 15, 2009).

[4] An appeal of Judge Mukasey's ruling was pending in the Second Circuit at the time of the settlement and is still being pursued by certain individuals who opted out of the settlement, one of whom is represented by counsel for

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The settlement provided an opportunity to receive payment in respect of long-lapsed European insurance policies to a worldwide class of Holocaust victims and their heirs who may have been former insureds of Generali or of certain of its pre-war affiliates or subsidiaries. In addition, the settlement provided that Generali would pay all claims in respect of Generali policies that remained pending and unpaid at the conclusion of the ICHEIC process, after the exhaustion of $100 million that Generali had made available to ICHEIC in 2001 for the payment of claims. (A-67.) Some 50,000 applications under the settlement were received from all over the world before the filing deadline. In deference to the age of many applicants, Generali has already processed some 14,000 applications and paid more than $36 million despite the lack of appellate finality. (SJA-38 at 7.)

Each Petitioner could easily have opted out of the settlement, as other opt-outs have done, thus

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(Cont'd)

Petitioners. In response to the Court of Appeals' recent inquiry, the United States Government has *confirmed* that litigation of Plaintiffs' claims is inconsistent with the Government's policy to resolve Holocaust-related disputes through negotiation. That policy was given effect in *Garamendi*, 539 U.S. at 421 ("the consistent Presidential foreign policy has been to encourage European governments and companies to volunteer settlement funds [for Holocaust-era related claims] in preference to litigation"), and relied upon by Judge Mukasey in dismissing the claims encompassed by the settlement. Petitioners mischaracterize the Government's straightforward response as "ambiguous" (Petition at 8-9 n.7), but avoid even a summary reference to its contents, much less any quotation from it.

preserving their right to litigate, and their potential ability to "discover records", "put Generali under oath", or engage in "cross examination" in litigation. (Petition at 15.) Instead, no Petitioner opted out, no doubt to be able to voice their persistent opposition to any negotiated resolution of Holocaust-related matters.[5]

The District Court carefully considered Petitioners' objections at three fairness hearings.[6] And the Second Circuit considered these objections on at least three different occasions – on a first round of briefing and argument, on a second round of briefing after a

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[5] At least two of the Petitioners (Alex Moskowitz and Fred Taucher), represented by the same counsel here, unsuccessfully opposed another Holocaust-era settlement of claims against Swiss banks. *See In re Holocaust Victim Assets Litig.*, 424 F.3d 132 (2d Cir. 2005), *cert. denied*, 547 U.S. 1206 (2006). In the same matter, Petitioner's counsel was criticized by the District Court for standing by while one of his clients sought to "extort" funds from the settlement. *In re Holocaust Victim Assets Litig.*, 311 F. Supp. 2d 363, 375 (E.D.N.Y. 2004), *aff'd*, 424 F.3d 150 (2d Cir. 2005), *cert. denied*, 547 U.S. 1206 (2006). As far back as 2000, counsel for Petitioners wrote to Attorney General Janet Reno excoriating ICHEIC and urging no support for the (eventually concluded) agreement between the United States and Germany that secured billions of dollars in additional reparations payments for World War II claims, including insurance. (A-247-66.) Likewise, Petitioner David Mermelstein and others wrote in 2000 to Deputy Secretary Stuart Eizenstat, then the Clinton Administration special envoy for Holocaust matters, objecting to any negotiated resolution of insurance claims against German companies. (A-267-71.)

[6] *See generally* January 31, 2007, February 27, 2007 and January 7, 2008 Fairness Hearing transcripts (A-353-433, A-507-70 and SJA-35-66, respectively).

supplemental worldwide mail notice was completed, and on Petitioners' motion for reconsideration.

When the settlement was first presented for approval before the District Court on January 31, 2007, Petitioners' "primary objection" (A-561) was that its original filing deadline would not accommodate a possible search for archival information that Petitioners' counsel speculated might be found in certain World War II archives located in the German city of Bad Arolsen. At the District Court's invitation, Generali and Class Counsel then amended the Settlement Agreement (A-442-47) to extend the filing deadline for claims supported by materials from those archives until well past the time that Petitioners' counsel stated was needed for this purpose. (A-444.) When the amended settlement was presented for approval, the District Court thus noted that the amendment yielded "even greater [results] than what was argued . . . by objectors as to what would be reasonable on [that] particular issue." (SPA-3.)

The District Court approved the settlement on February 27, 2007. (Petition, Appendix D; SPA-11-15.) Petitioners appealed. On October 2, 2007, the Second Circuit, raising no concerns with any other of Petitioners' arguments, remanded to the District Court for the limited purpose of effecting notice by mail to possible class members whose names were known by Generali. (Petition Appendix C; SJA-6-7.) As a result, a further notice, approved by the District Court (SJA-8-9), was thereafter mailed to 49,326 individuals, and to 97 legal and institutional representatives worldwide representing 3,155 additional possible class members.

(SJA-18.) This mail notice ordered by the Court of Appeals was *in addition to* the comprehensive program of worldwide notice in 16 languages carried out pursuant to the notice plan approved earlier by the District Court. (A-85; A-87-100 (details of the worldwide notice program).)

On January 7, 2008, after the supplemental mail notice ordered by the Court of Appeals had been completed, the District Court held another fairness hearing, preceded by another opportunity for Petitioners to brief and argue any objections they chose to make. The District Court approved the settlement again, finding that the mail notice sent out was "consistent with the Second Circuit's remand and mandate" (SJA-63 at 62) and "adequate and sufficient and complied with the requirements of due process." (SJA-2; Petition, Appendix B at 7a.) After entertaining yet another round of briefing (in which Petitioners again raised many of their arguments here), the Second Circuit affirmed the judgment of the District Court on June 6, 2008. *See* Petition, Appendix A. On September 15, 2008, the Second Circuit, having considered a *third* set of Petitioners' briefs on these matters, denied Petitioners' Petition for Panel Rehearing or Rehearing En Banc. *See* Petition, Appendix E. This Petition followed.

REASONS FOR DENYING THE PETITION

None of Petitioners' arguments merits review. Petitioners challenge the settlement under *Amchem Products, Inc. v. Windsor*, 521 U.S. 591 (1997), and *Ortiz v. Fibreboard Corp.*, 527 U.S. 815 (1999). (Petition at 14-25.) The simple misapplication of properly stated rules of law, which is all Petitioners assert, does not warrant review. Further, Petitioners contend that the Second Circuit misapplied its own precedent in *National Super Spuds, Inc. v. New York Mercantile Exchange*, 660 F.2d 9 (2d Cir. 1981) (Petition at 18-19), a contention that does not merit review either. Petitioners' remaining ancillary arguments object to the wording of the class notice, and allude to ICHEIC's alleged failings and Class Counsel's adequacy. (Petition at 25-33.) These objections, which challenge fact-intensive matters reserved to the lower court's discretion, were all considered and rejected by the courts below, and provide no basis for review.[7]

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[7] Some eighteen months after entering into the settlement, ICHEIC participants, including Generali, volunteered to Congress their intention to continue entertaining Holocaust-related claims that might be made in years to come, despite the conclusion of the ICHEIC process – assurances that Generali intends to honor but which are not legally binding. *E.g.*, *Frazier v. American Airlines, Inc.*, 434 F. Supp. 2d 279, 287 (D. Del. 2006) ("statements made by . . . executives during the Senate Subcommittee hearing" that "[American Airlines] 'intend[s] to offer retirees pass privileges' . . . is, at most, a statement of future intent, and therefore, it is insufficient to constitute a binding contractual offer"), *aff'd*, 229 Fed. Appx. 171 (3d Cir. 2007). Yet Petitioners claim that this

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I. THERE IS HERE NO RULE 23 OR DUE PROCESS VIOLATION UNDER *AMCHEM* OR *ORTIZ*, AND NO *NATIONAL SUPER SPUDS* ISSUE TO MERIT GRANT OF CERTIORARI

Petitioners attempt to analogize this settlement to those rejected in *Amchem* and *Ortiz*. Both are cases with "serious intra-class conflicts" between those class members who, at the time of the settlement, were already afflicted with an asbestos-related disease, and those who had been exposed to asbestos but did not have a manifest injury (exposure-only class members). *Amchem*, 521 U.S. at 610; *see also Ortiz*, 527 U.S. at 856-57. This issue, although central to the singular instance of widespread asbestos settlements, is of no relevance to this case. Petitioners struggle to fit this case into the *Amchem/Ortiz* template by creating artificial sub-classes in what is a uniform settlement class, and likewise manufacture sub-classes that, in their view, are releasing claims without compensation, in violation of *Super Spuds*.

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statement renders the settlement unfair or illusory. (Petition at 12-13.) They are wrong. An unenforceable statement of voluntary intention (*see id.* at n.12 (speaking of "intentions regarding future claims which may be submitted on Holocaust era insurance policies")) is not a substitute for an enforceable settlement under court supervision, nor does it render such a settlement illusory. *E.g.*, *Vitkus v. Beatrice Co.*, 11 F.3d 1535, 1539 (10th Cir. 1993) (release supported by consideration because no pre-existing duty to pay).

In the end, Petitioners' objection is that *they* (and perhaps others whose applications under the settlement may not lead to compensable policies) will be treated "inequitably" because their experiences in the ICHEIC process suggest that they would not receive offers of compensation in the settlement. (Petition at 24-25.) That, however, is a simple eligibility issue and betrays no inequity or structural flaw in the settlement that would place it at odds with *Amchem*, *Ortiz*, or *Super Spuds*. Reasonable criteria for eligibility and compensation are routine in Rule 23(b)(3) settlements to distinguish between compensable and non-compensable claims and to determine the amount of compensation due. Unlike the thousands who received compensation under ICHEIC, no compensable policy could be found to exist for *these* individual Petitioners. But this is not surprising, as most of these Petitioners never even claimed to have had a Generali policy in their families. For example, Petitioner Alex Moskowitz' application to ICHEIC contained no indication he believed *Generali* had issued a policy to his family – he simply asked ICHEIC to investigate if any ICHEIC member company had issued such a policy. Likewise for Petitioners Irene and David Mermelstein. So too, Petitioners Taucher and Lindenbaum never made *any* application to ICHEIC asserting even a belief that Generali had issued a policy to someone in families. (A-234-42.) The record of how Petitioners' applications to ICHEIC were addressed, to the extent known to Generali, was laid out in full before the courts below and was unchallenged. Contrary to the impression they seek to give here, that record confirms that Petitioners' claims were fairly addressed and, in those cases where the claimants elected to follow with binding appeal, the

results were affirmed before impartial and distinguished appellate arbitrators. (*Id.*)

A. The Settlement Raises No *Amchem* Issue

In *Amchem*, this Court rejected the settlement because the tension between already-afflicted and exposure-only class members, as well as differences in applicable law, barred a finding of "predominance" under Rule 23(b)(3). *Amchem*, 521 U.S. at 623-24. Also, the difference in the medical conditions and financial incentives of these subclasses did not permit an adequacy-of-representation finding under Rule 23(a)(4) where no "structural assurances" had been put in place separately to protect these disparate interests. *Amchem*, 521 U.S. at 625-27.

By contrast, every class member can submit an application in the settlement that will be addressed under the same eligibility and valuation criteria, a point Petitioners accept. (Petition at 19.) Unlike *Amchem*, where "[c]lass members . . . receive[d] no compensation for certain kinds of claims", like consortium claims, claims by exposure-only plaintiffs, and pleural claims, 521 U.S. at 604, no class member with a valid policy is excluded from compensation under this settlement. There exists no "category" of class members that are subject to a different treatment under the settlement – *all* class members, victims of the Holocaust with a compensable Generali policy during the Class Period (or their heirs), will have their claims paid under the *same* eligibility and valuation criteria. Class members can recover, as most applicants did in ICHEIC, even if they lack any information about a Generali policy in their

families, solely on the basis of a request that Generali search its own records for such a policy based on family information provided by applicants. Similar criteria produced recoveries for thousands in the ICHEIC process, and the Court of Appeals found no abuse of discretion in the District Court's conclusion that the settlement adopting such criteria was fair, reasonable, and adequate. Nothing in *Amchem* offers a basis to grant certiorari here.

B. The Settlement Raises No Issue Under *Ortiz*

Ortiz involved a "mandatory" Rule 23(b)(1)(B) class on a "limited fund" theory with no opt out rights. *Ortiz*, 527 U.S. at 845-47. In rejecting the settlement, this Court principally objected to the absence of support for the finding of a "limited fund", *id.* at 848-54, and to the inequitable treatment within the class, *id.* at 855-60, shortcomings rendered all the worse by the no-opt-out feature of the settlement. As in *Amchem* two years earlier, it criticized the conflict in treating present and future claimants similarly despite the difference in their circumstances. *Id.* And as was the case in *Amchem*, the settlement in *Ortiz* did not "provid[e] for procedures to resolve the difficult issues of treating such differently situated claimants with fairness as among themselves." *Ortiz*, 527 U.S. at 856; *see also id.* ("[A] class divided between holders of present and future claims . . . requires division into homogeneous subclasses under Rule 23(c)(4)(B), with separate representation to eliminate conflicting interests of counsel.").

None of the foregoing applies here. This settlement, as noted, is *not* of the limited fund type, but a "claims

made" settlement under Rule 23(b)(3). (Petition, Appendix A at 4a ("There is no cap on the amount to be allocated among class members").) This is a *open-ended* settlement, in which *all* validated claims will be paid (A-566, SJA-38 at 7-8), and where all class members had a right to opt out. On that basis alone, *Ortiz* offers Petitioners no basis to seek review.[8] Moreover, any reference to ICHEIC as a $100 million "limited fund" is wholly irrelevant and misleading.[9] This settlement gives rise to none of the tensions stemming from the competition over a limited fund or from the disparate treatment of certain class members that troubled this Court in *Ortiz*. That the settlement contains valuation and eligibility standards (Petition at 23-25) leading to individualized payments based on the currency in which a compensable policy was written, its amount, the

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[8] For that reason too, and contrary to Petitioners' claim (Petition at 25), there are no Seventh Amendment jury trial rights at issue here. Petitioners were all free to opt-out and pursue their claims in court but deliberately eschewed that course. *See Ortiz*, 527 U.S. at 846-47 ("Unlike Rule 23(b)(3) [at issue here], objectors to the collectivism of a *mandatory* subdivision (b)(1)(B) action have no inherent right to abstain.") (emphasis added).

[9] To be sure, Generali's exposure to ICHEIC was originally capped at $100 million (A-67), believed to be more than sufficient to pay all Generali-related ICHEIC claims. Thus, ICHEIC never allocated compensation to claimants as if from a "limited fund" to guarantee no eventual shortfall in payments – all compensable claims were paid in full on an ongoing basis under ICHEIC criteria, and therefore there remained certain unpaid claims at the conclusion of the ICHEIC process after the exhaustion of the $100 million. This settlement funded the payment of those claims for which $36 million has already been expended. There remain no unpaid Generali-related ICHEIC claims outstanding.

country in which it was issued, and other factors offers no basis to mount a challenge under *Ortiz*. Quite the contrary, as these criteria ensure the treatment of claimants tailored to individual circumstances, a feature absent in *Ortiz*. In any event, these standards were carefully considered by the courts below in determining that this settlement was fair.[10]

Petitioners postulate artificial categories of claimants – those who had submitted ICHEIC claims, those who may be "unaware" that they may be class members, and those who purchased policies from Generali subsidiaries – to bring this settlement under *Ortiz*. But there is no genuine inter-class conflict: all class members are Holocaust victims (or their heirs/

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[10] Petitioners assert, *ipse dixit*, that the values offered in ICHEIC were "below their true values" (Petition at 24), relying entirely on the discreditable speculations of Mr. Sidney Zabludoff, and that therefore the class as a whole did not "get the best possible recovery from the available funds" under this settlement as required under *Ortiz*. In fact, the amounts offered were extremely generous for policies written typically in local currencies that lost most of their value during and following World War II. The valuation guidelines developed in ICHEIC and incorporated into this settlement provide for the conversion of these currencies to U.S. dollars using 1938 exchange rates, a generous presumption which insulated claimants from the collapse these currencies suffered thereafter. These base dollar values are then multiplied by 10 to establish the dollar values as of December 31, 1998 and updated by applying to them the consumer price index in the United States for each year after 1998. (ASA 38.) Recoveries in the ICHEIC process averaged almost $ 25,000 for compensable Generali claims, with some recoveries in the hundreds of thousands of dollars or more, depending on the particulars of the policy involved. (ASA-54.)

successors) who were insureds or beneficiaries of policies issued by Generali or certain of its affiliates before the end of World War II in Europe (A-58), and there is no characteristic or condition that meaningfully distinguishes members of these spurious categories from other class members. All class members are subject to the *same* eligibility and valuation criteria, which are applied *uniformly* to their situation based on the particulars of the specific policy that was issued to them or to a member of their family. There is no room here for any claim of inter-class conflict or of inequity as in *Ortiz*.[11]

C. *Super Spuds* Offers No Basis To Grant Certiorari

Petitioners also argue that certain claimants are being asked to release their claims under the settlement without compensation, in violation of *National Super Spuds, Inc. v. New York Mercantile Exchange*, 660 F.2d 9 (2d Cir. 1981). The alleged misapplication by the Second Circuit of its own precedent offers no basis for review. In any event, Petitioners' argument has no merit.

Super Spuds invalidated a settlement that released claims not asserted in the complaint for no consideration. In *Super Spuds*, the complaint sought to recover on behalf of a class of purchasers of certain liquidated futures contracts. *Id.* at 11. However, the settlement also

[11] Petitioners claim that the District Court did not examine this settlement from a certification standpoint (Petition at 22), a contention squarely contradicted by the District Court's careful examination of this settlement pursuant to Fed. R. Civ. P. 23(b)(3). (Petition, Appendix B at 8a-10a; SJA-2-4.)

precluded (but did not offer compensation for) claims based on *un*liquidated contracts, a feature the settlement notice omitted. *See id.* at 13-14. The releases were thus broader than the claims asserted and the settlement would have inappropriately extinguished the objectors' claims on *un*liquidated contracts without compensation. The Second Circuit observed that "the underlying settlement agreement [in *Super Spuds*] provided for release of two types of claim 'in return for payments that were to be determined solely' based on the rights under one type of claim." (Petition, Appendix A, at 3a (quoting *Nat'l Super Spuds*, 660 F. 2d at 14).) In other words, payments to holders of liquidated futures could not be secured by sacrificing the claims of holders of *un*liquidated contracts whose claims were also extinguished in the settlement.

To shape this settlement into the *Super Spuds* mold, Petitioners rely on the artificial "categories" of claimants they say are being asked under the settlement to release claims without compensation – those who had their claims previously denied under ICHEIC[12], those who

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[12] Petitioners' claim that the settlement offers no compensation to those previously denied under ICHEIC by making ICHEIC denials "legally binding". (Petition at 15.) But as the Second Circuit confirmed (Petition, Appendix A at n.1) and as Petitioners acknowledge (Petition at 19), the settlement does not bar persons whose claims were previously denied in the ICHEIC process from submitting new applications for compensation. However, Petitioners contend that the courts below misapprehended their argument, which is that it would be *futile* for ICHEIC applicants to try and submit an application, and, therefore, those previously denied in the

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never filed a claim[13], and those who purchased a policy from a Generali subsidiary.[14] This is simply not so. In this settlement there is complete congruity between the

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ICHEIC process would be releasing Generali for no consideration. (*Id.*) Although the notice approved by the courts expressly observed that absent additional or new information about a prior claim, or claims made in the name of a previously unmentioned relative, the results of a search for a compensable policy in Generali's archives under the settlement would likely be similar to the results under the ICHEIC process, this merely confirms the integrity and consistency of the search methodology applied. There is nothing "futile" in a settlement that allowed applicants who had already availed themselves of the ICHEIC process to submit new or different information in an effort to locate a compensable policy. In fact, as the District Court noted, these individuals would get "two bites at the apple" — first under ICHEIC and then under the settlement. (A-391.)

[13] This "category" of persons who have not filed a claim because they are not aware of their class membership hardly raises a *Super Spuds* issue; that is so in *every* class action settlement, and implicates only an issue about the adequacy of notice, entirely absent here where some 50,000 persons the world over have made applications in the settlement. *See* Point II, *infra*.

[14] Documented claims against often long defunct pre-war local Generali subsidiaries or affiliates (for whom Generali would ordinarily not be liable) are encompassed by the Settlement and raise no *Super Spuds* issue. Generali's agreement to pay for validated policies issued by subsidiaries or affiliates continues to be beneficial to claimants, no matter how often Petitioners decry the absence of subsidiary or affiliate records (Petition at 20-21) – a perfectly understandable situation after many decades, wars, and Nazi and Communist revolutions. (A-472-76.)

claims asserted and compensated, and the releases given. The settled class complaints sought relief on behalf of Holocaust victims who claim that they were insureds or beneficiaries (and/or their heirs/successors) on Generali policies, and assert claims related to insurance policies issued by Generali before the end of World War II throughout Europe. (ASA-12; ASA-15.) And correspondingly, "the settlement agreement challenged in the instant case provides for release of all claims against Generali 'resulting from or relating to any Insurance Policy,'" during that period. (Petition, Appendix A, at 4a (citing to A-65).) Thus, no group here, let alone the "tens of thousands" of people hypothesized by Petitioners, was asked to surrender uncompensated claims or claims not made in the settled complaints for the benefit of the compensated class, as was the case in *Super Spuds.*[15]

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[15] That "tens of thousands" of potential claimants still exist is an extravagant notion of Mr. Zabludoff (whose declarations were repeatedly submitted by Petitioners to the courts below) that there were 110,000-150,000 "Jewish" Generali policies, of which he surmises, $2 billion in value remain unpaid. (Petition at i & n.1.) This is erroneous speculation. For example, the bedrock of Zabludoff's hypothesis is that there were 56.1 million policies in force in all Europe before the war, from which he assigned a share to Generali. But the 56.1 million total included some 45 million policies (more than 80% of the total) in the German, Dutch and Belgian markets. (A-230-31). These countries have their own domestic arrangements for the repayment of Holocaust-era claims and Generali was *never responsible* for German, Dutch or Belgian claims either in ICHEIC *or in this settlement* – this alone overstates Zabludoff's estimate by more than 5 fold. In fact, total Generali policies (Jewish *and* non-Jewish) in force at the end of 1936 numbered

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As noted, the Petitioners' singular underlying objection is to the reasonable requirement that the existence of a compensable claim be shown as a threshold to recovery. (Petition at 19-20.) However, that objection has nothing to do with the scope of the releases under *Super Spuds*. As the Second Circuit properly stated in rejecting this argument, "the ability to establish a valid claim constitutes the factual predicate for both the claims being released and claims being compensated." (Petition, Appendix A, at 4a.) [16]

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about 89,000, as verified by independent auditors (A-244-45), of which only a small percentage could have been held by customers who were Jewish or other targeted Holocaust victims (and thus covered by ICHEIC or this settlement), given the known European population makeup at the time. *See* Int'l Comm'n on Holocaust Era Ins. Claims, *Task Force Report on The Estimation of Unpaid Holocaust Era Insurance Claims in Germany, Western and Eastern Europe, available at* http://www.icheic.org/pdf/Pomeroy-Ferras%20Report.pdf (last visited Jan. 15, 2009).

[16] None of the authorities that confirms the teaching of *Super Spuds* and on which Petitioners rely (Petition at 17-18) is applicable, because there is just no *Super Spuds* issue here, as the Second Circuit's decision confirmed. *See Mirfasihi v. Fleet Mortgage Corp.*, 356 F.3d 781, 782-83 (7th Cir. 2004) (settlement reallocated recovery from one class to another); *Piambino v. Bailey*, 610 F.2d 1306, 1329 (5th Cir. 1980) (settlement unfair to class members who, unlike any here, had already obtained valuable judgments against the defendant in other forums entitled to full faith and credit), *cert. denied*, 449 U.S. 1011 (1980); *Petruzzi's, Inc. v. Darling-Delaware Co.*, 880 F. Supp. 2d 292, 301-02 (M.D. Pa. 1995) (antitrust settlement rejected because only the settling defendant's customers would be

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II. PETITIONERS' OBJECTIONS TO THE FORM OF CLASS NOTICE DO NOT MERIT REVIEW

Notice need only be "'reasonably calculated under all the circumstances, to appraise interested parties of the pendency of the action and afford them an opportunity to present their objections.'" *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 812 (1985) (quoting *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950)). The adequacy of notice is within the sound and broad discretion of the district court. *See Wal-Mart Stores, Inc. v. Visa U.S.A., Inc.*, 396 F.3d 96, 113-16 (2d Cir. 2005), *cert. denied*, 544 U.S. 1044 (2005). The particulars about notice to which Petitioners object were all addressed fully by the courts below – indeed, the Second Circuit ordered worldwide mail notice in response to one of the Petitioners' objections. And none offers any basis for review.

The class notice provided, in terms the courts below repeatedly reviewed, all the information required by

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compensated, although customers of the other defendant had the same conspiracy claim against the settling defendant); *Molski v. Gleich*, 318 F.3d 937, 953-54 (9th Cir. 2003) (only lead plaintiff and his attorney were entitled to recover damages). *In re General Motors Corp. Pick-Up Truck Fuel Tank Products Liability Litigation*, 55 F.3d 768, 808-09 (3d Cir.1995), *cert. denied*, 516 U.S. 824 (1995), and *In re Ford Motor Co. Bronco II Products Liability Litigation*, Civ. A. MDL-991, 1995 WL 222177, at *4-5 (E.D. La. Mar. 15, 1995), involved non-cash settlements awarding class members unusable coupons and safety information already mandated by federal law, and are similarly inapplicable and involve distinguishable facts.

Rule 23, including the right to opt out, to object, and the particulars of the settlement. (SJA-23-26.) The notice advised that class members would be bound unless they took steps to exclude themselves. (SJA-24.)

However, Petitioners continue to object to notice because it did not (falsely) say, as Petitioners wished, that the results of previous ICHEIC applications would be "legally binding" (Petition at 26), because it gave the "impression" that the court endorsed the settlement, because it "wrongly implied" that claims based on anecdotal evidence would be validated (*id.* at 27), and because they speculate that some possible class members in Israel or in the Brooklyn Holocaust survivor community may have been "biased in favor of joining the settlement" or "naturally inclined to file claims." (*Id.* at 27-28.)[17] Every objection as to the form of notice that Petitioners reiterate here was carefully considered by the District Court and reviewed by the Second Circuit. These courts confirmed that the notice used in this settlement was clear, neutral, and satisfied Rule 23. (SPA-5; SJA-8; SJA-64 at 64; Petition, Appendix A, at 4a ("[T]he record [below] indicates that the notice provided to potential class members satisfied the requirements of due process, [Rule] 23 and *Amchem Products*, 521 U.S. at 620-21.").) Review is wholly unjustified on this quintessentially factual objection.

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[17] Contrary to what Petitioners again argue here (Petition at 27), it is settled that opt-out forms are not required under Rule 23. *See Patrowicz v. Transamerica HomeFirst, Inc.*, 359 F. Supp. 2d 140, 152-53 (D. Conn. 2005); *Mariott v. County of Montgomery*, 228 F.R.D. 133, 133-34 (N.D.N.Y. 2005).

III. PETITIONERS' REMAINING OBJECTIONS DO NOT MERIT REVIEW

Petitioners conclude with a section captioned as if disputing the adequacy of class counsel's representation. (Petition at 28-33.) In fact, it is a repository for unsupportable charges these Petitioners have consistently and unsuccessfully made against ICHEIC and Generali in seeking to dismantle any settlement. None of these baseless and provocative accusations justifies granting review, and all were fully ventilated before the courts below.

First, Petitioners' litany of ICHEIC's alleged "failures" is irrelevant.[18] ICHEIC's performance or features are not at issue here, as Petitioners intimate. (*See* Petition at 25 ("If ICHEIC were presented to a district court . . . no court would approve it.").) There is no logic in the contention that, in not "judging ICHEIC's performance," the District Court failed to protect the interests of absent class members. (*Id.* at 33.) This is all a red herring – no court has been asked to "approve" ICHEIC, and ICHEIC's alleged shortcomings have no bearing on this settlement. The settlement at issue here incorporates valuation and eligibility standards developed in the ICHEIC process

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[18] In a different context, this Court itself, when faced with a barrage of similar arguments challenging the U.S. Executive's choice of ICHEIC as an effective mechanism to resolve Holocaust-era insurance claims, *see Garamendi*, 539 U.S. at 406-12 (2003), noted that "our thoughts on the efficacy of [ICHEIC] versus [litigation] are beside the point, since our business is not to judge the wisdom of the National Government's policy" supporting ICHEIC to the exclusion of litigation. *Id.* at 427.

(that the District Court evaluated and found to be adequate), but the settlement's *implementation* remains entirely under the supervision of the federal court that approved it, as the District Court observed in rejecting these very arguments. (A-564-66; SJA-56 at 45-46.) As noted, thousands the world over benefited from ICHEIC's monumental and unprecedented effort to identify and pay ancient policies.

Petitioners' further objections, masked in derisive phrases such as "phantom rule" or "negative evidence" (Petition at 29-30), were all considered and found wanting by the courts below, despite the support of several *amici* who filed briefs on Petitioners' behalf.[19] Petitioners also continue pressing the provocative notion that Generali "identified" the "Jewish race" of customers

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[19] The expression "phantom rule" was coined by a single appellate arbitrator (charged under ICHEIC rules with an independent and binding review of awards at the request of claimants) who elected to disregard ICHEIC rules and took umbrage at ICHEIC's reasonable attempt to call these rules to his attention. *See* Brief in Opposition to Albert Lewis's *Amicus Curiae* Submission, dated September 14, 2007, filed in the Second Circuit Action. This arbitrator was one of the *amici* below in support of Petitioners' objections. (Petition at 30 n.19.) And no "negative evidence" was used to deny claims; rather reasonable evidentiary rules were adopted by ICHEIC, based on independently audited records, to determine if a Generali policy was (or was not) in effect during a historically-determined "Holocaust Period" in each country and therefore entitled to compensation under ICHEIC rules. *See* Brief in Response to *Amicus Curiae* Brief Filed in Support of Plaintiffs-Appellants, dated August 22, 2007, filed in the Second Circuit Action. Another *amicus* appeared below on Petitioners' behalf to press the "negative evidence" argument as well. (Petition at 30 n.20.)

in its policies, when in fact nothing in two ancient letters from Italian officials on which they rely for this charge (A-450-52) comes close to showing that *Generali* identified any customer by religion, much less that its policies contained information about religion.

In the end, the District Court repeatedly considered each of these factual arguments on ICHEIC's failings (A-564; SJA-48), the standards and processes employed to evaluate claims under this settlement (A-394-95; SJA-48 at 30; SJA-54-55), class counsel's diligence, and Generali's alleged non-disclosures. (A-565; SJA-40 at 11; SJA-44-48.) And based on the record before it, the District Court found them to be "factually inaccurate, speculated without sufficient evidentiary support, or even if true [not a] legal basis to deny approval of the settlement." (A-561; *see also* SJA-64-65 (assessing settlement terms and compensation and weighing the risks of litigation and finding the settlement to be in the best interests of the class, "with the consideration of additional arguments, objections, and reconsideration of the previously made arguments and objections").) The Court of Appeals, likewise found no basis to disapprove the settlement in the same barrage of baseless accusations. (Petition, Appendix A, at 5a (affirming "[h]aving considered all of [these] arguments on appeal and found them to be without merit.").) Petitioners' request for further reconsideration of these factual matters does not warrant review.

CONCLUSION

The Petition for a writ of certiorari should be denied.

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Respectfully submitted,

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